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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 661334

CLAUDE MACK LIGHTFOOT,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Claude Mack Lightfoot petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit which affirmed a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, convicting the defendant after a jury trial on a one count indictment (R. 3)[1] charging violation of the so-called "membership clause" of section 2 of the Smith Act, 54 Stat. 671, 18 U. S. C. 2385.

[1] We use "R." to designate the printed record from the court below. "App." refers to an appendix to this petition. "G. Ex." designates an exhibit offered by the prosecution and "D. Ex." an exhibit offered by petitioner.

Opinion Below

The opinion of the court below (App. A, *infra*, p. 37) has not yet been reported.

Jurisdiction

The judgment of the court below is dated and was entered on January 12, 1956. Jurisdiction of this Court is conferred by 28 U. S. C. 1254.

Questions Presented

1. Whether the decision below that the evidence sustains the verdict violates accepted and constitutionally protected standards governing proof of guilt.

2. Whether the membership clause of the Smith Act is unconstitutional on its face or as applied in this case.

3. Whether the trial court erred in denying petitioner's motion that the court inspect the contemporaneous report made to the F. B. I. by a prosecution witness concerning the subject matter of his testimony so that it could determine whether the report contradicted the testimony and was therefore material to the defense.

4. Whether the conviction and the affirmance below were based on evidence which should have been excluded as incompetent, irrelevant and remote.

5. Whether the trial court erroneously construed and applied the membership clause of the Smith Act and the indictment in instructing the jury that the teaching and advocacy to which the indictment refers is the teaching and

advocacy of the Communist Party as an entity and not that of the members individually.

6. Whether the immunity conferred by section 4(f) of the Internal Security Act (50 U. S. C. 783(f)) bars prosecution of the offense charged in the indictment.

7. Whether the findings made by Congress in the Communist Control Act with reference to the Communist Party deprived the petitioner of the right to a fair and impartial trial.

Statutes Involved

The Smith Act and the pertinent provisions of section 4(f) of the Internal Security Act of 1950 and of sections 2, 3, and 4 of the Communist Control Act of 1954 are set forth in Appendix B, *infra*, p. 54.

Statement of the Case

This case and *Scales* v. *United States*, No. 626, this term (petition for cert. filed January 16, 1956), involve the first trials under the membership clause of the Smith Act, proscribing membership in a society of persons who teach or advocate the overthrow or destruction of the government of the United States by force or violence with knowledge of the purpose thereof.[2] Both cases present identical questions as to the constitutionality of the statute on its face, the effect of section 4(f) of the Internal Security Act as a bar to the indictments, and the effect of sections 2, 3 and 4 of the Communist Control Act on the right of the petitioners to a fair and impartial trial.

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[2] Ten additional indictments under the membership clause are pending in the District Courts. *United States* v. *Blumberg*, E. D. Pa.; *United States* v. *Noto*, W. D. N. Y.; *United States* v. *Weiss*, N. D. Ill.; *United States* v. *Dennis*, *United States* v. *Gates*, *United States* v. *Winter*, *United States* v. *Davis*, *United States* v. *Hall*, *United States* v. *Thompson*, *United States* v. *Foster*, all S. D. N. Y.

The Indictment.

The indictment (R. 3), returned on May 14, 1954, charges in two paragraphs of a single count:

1. That, continuously since July 26, 1945, the Communist Party of the United States has been "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the government of the United States by force and violence as speedily as circumstances would permit."

2. That, continuously since July 26, 1945, the petitioner has been a member of the Communist Party "well knowing" that it is a society, group and assembly of persons who teach and advocate the doctrine alleged in paragraph 1, "and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit."

The Evidence.

Petitioner's membership in the Communist Party during the indictment period was conceded (R. 10). The issues of fact for the jury were therefore whether petitioner had the knowledge and intent charged in the indictment within the three year statutory period immediately preceding its return.

The prosecution called eight witnesses whose testimony is material.[3] All were former members of the Communist Party. Five had joined at the request of and had received monies from the F. B. I. to spy on the organization.[4] A

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[3] In addition, four witnesses identified documents which established that, as conceded, petitioner was a member and officer of the Communist Party during the indictment period (R. 16-28; G. Exs. 1-16). The testimony of two other prosecution witnesses was stricken (R. 31, 472).

[4] Herron (R. 34, 52), Cummings (R. 434), Czarnowski (R. 317, 387-89), Ondrejka (R. 303), and Brzek (R. 452, 463).

sixth, the "expert," Lautner, is a full-time professional witness for the Department of Justice in anti-Communist cases (R. 215).

Petitioner's affirmative case was confined to the introduction of one exhibit and the reading of portions of exhibits offered by the prosecution (D. Ex. 3; R. 473, 476-79, 474-75, 479-80, 486-87).

In what follows, we summarize the evidence.

(1) Acts and Declarations of the Petitioner.

All that the evidence established with reference to the petitioner was (a) that for many years he had been a member and officer of the Communist Party and had taught in its schools; (b) that he knew that the Communist Party based itself on the principles of Marxism-Leninism, and (c) that he was an adherent of these principles and was familiar with the excerpts from the "classical" writings of Marx, Engels, Lenin and Stalin offered in evidence by the prosecution. There was no evidence (and the opinion below cites none) that the defendant or any other American Communist had ever said or written that he or the Communist Party advocated the violent overthrow of the government or that he understood the principles of Marxism-Leninism as including such advocacy.

The testimony of four prosecution witnesses was confined to describing petitioner's attendance at meetings where he or other Communists spoke.[5] If this testimony is accepted in its entirety, it establishes no more than that the petitioner and other speakers called for the building of the Communist Party, particularly among the Negro people and working people; urged Communists to work more effectively in trade unions and veterans organizations; expressed their desire for and confidence in the eventual

[5] Herron, Cummings, Ondrejka and Czarnowski. Only three of the sixteen meetings they testified about took place within the three years next preceding the indictment (R. 307-10, 334-35, 370-72).

establishment of socialism in this country; praised the Soviet Union and its leaders, and opposed the cold war policies of the Truman administration. Additionally, at a meeting in 1947, petitioner was said to have stated that he would not make organization records available to a legislative investigating committee, and to have advised Communists not to reveal their membership publicly if to do so would jeopardize their positions in the community[6] (R. 43-44, 305-310, 334-35, 346-64, 370-72, 437-38).

The witness, Meyer, worked closely with the defendant in the Chicago Communist Party from 1934 to 1942 (R. 61, 110). From 1938 to 1941 Meyer was the director of a Communist Party school where petitioner taught courses on Marxism-Leninism, the History of the Communist Party of the Soviet Union and political economy (R. 63, 68). Meyer testified that he made it a practice to attend petitioner's classes once or twice each term (R. 68). However, he was not asked and did not testify as to what petitioner taught.

Early in 1940, Meyer and petitioner held a series of discussions in connection with a revision of teaching methods in the advanced political courses in the school. Meyer testified that they discussed the content and use of textbooks, including the *History of the Communist Party of the Soviet Union* and the "classical" writings of Marx, Engels, Lenin and Stalin, excerpts from which were later introduced by the prosecution (R. 96-108). He testified that the discussions resulted in agreement upon what should be taught and how it should be taught (R. 97). However, he was not questioned and did not testify about the content of the agreed-upon teaching or concerning petitioner's interpretation of the text books or his understanding of the application of their contents to the United States. Nor, with a single irrelevant exception (R. 114-15) did the witness

[6] The court below characterized the latter statement as advice to "the membership on the use of the underground" (App. A, *infra*, p. 39).

testify to the content of any conversation with or statement by the defendant during the eight years of their intimate association. Petitioner's objections to Meyer's testimony as remote and irrelevant were overruled (R. 62, 125-26).

The witness, Miss Skinner, testified that in 1946 she had taken a course in the fundamentals of Marxism taught by the petitioner and had attended a 1947 school where he taught classes in "strategy and tactics" and "history and role of the Party" (R. 450). She was not questioned and did not testify about petitioner's teaching in these classes.

The witness, Brzek, who joined the Communist Party to spy on it at the request of the F. B. I. (R. 452), testified that he, like Miss Skinner, had attended the 1947 school. It is impossible to paraphrase his semi-literate and frequently unintelligible story (R. 460-62) as to petitioner's alleged teaching there.[7] The opinion below (App. A, *infra*, p. 44) relies on petitioner's supposed statement that "if we have to spill blood, we will," as evidence of an intent to overthrow the government by force and violence as soon as circumstances permit. Any conceivable support which this alleged statement might lend to the conclusion of the court below collapses when the words are read in the context from which they were torn. The witness' full rendering of petitioner's alleged statement was as follows (R. 462):

> "He approached us again with, as I remember it, that we will try to avoid bloodshed and we will approach it to avoid bloodshed.
>
> "However, we will not be pushed off. If we have to spill blood, we will."

At most, these words state the view that a resort to force may be necessary to effectuate the will of the majority if, at some future time, peaceful channels for social change are no longer open. As the trial judge instructed the jury

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[7] E.g., he quoted petitioner as saying, "The bloodshed end, the bloodshed, it wouldn't be by, say, shooting firearms, to be by a more quiet method" (R. 462).

(R. 583) the teaching of that view is not proscribed by the Smith Act.

Brzek testified that he had made a written report to the F. B. I. on the teaching of the petitioner at the 1947 school (R. 467-68). The trial court denied petitioner's motion that the report be produced for inspection by the trial judge so that he might determine whether it contradicted the testimony of the witnesses and was therefore material to the defense (R. 468-69, 472).

The only other evidence concerning the petitioner consisted of a number of his published speeches and writings, introduced by the prosecution, which discuss methods for building the Communist Party and topical political questions (G. Exs. 57, 58, 59, 60, 63, 64, 66; R. 344-45, 363, 374-80). None of them so much as suggests the means by which their author believed that socialism can or should be brought about in this country. They contain the only evidence in the entire record of petitioner's understanding of the meaning and application of the principles of Marxism-Leninism to which he avowed adherence. The petitioner wrote (R. 475, emphasis supplied):

> "Marxism-Leninism gives us the power of orientation. It enables us to perceive the direction in which things are heading. *It does not, nor can it determine, for us beforehand, the form nor the exact time of a new social development.*"

(2) The Lautner Opinion Testimony.

Lautner, whose only contact with the defendant was in once "checking him in" as a convention delegate (R. 170), testified as an "expert" for the prosecution.[8]

Over petitioner's objection that the testimony was incompetent and irrelevant, Lautner was permitted to give

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[8] Lautner did not consider himself an expert on Marxism-Leninism and testified that even those who believe themselves to be experts sometimes disagree as to the meaning and application of Marxist principles (R. 273-75).

his opinion as to the meaning of Marxism-Leninism and the aims and objectives of the Communist Party (R. 205, 210).[9] He did not testify that Marxism-Leninism or the Communist Party advocated the violent overthrow of the government.[10] He stated that the "final aim" of the Communist Party "is the destruction of the existing social order known as imperialism * * * and its governments, and instituting instead through the proletarian revolution and the dictatorship of the proletariat, socialism" (R. 211).[11] Any possible ambiguity in this statement was cured on cross examination when Lautner testified that it was the position of the Communist Party that if socialism could not be established in this country by peaceful, electoral means, it would only be because the trusts and monopolies would use force and violence to prevent this result (R. 281).

(3) The "Classical" Communist Literature.

Over the petitioner's objections, the trial court admitted into evidence excerpts from the writings of Marx, Engels,

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[9] He was permitted to testify as to the party's current aims and objectives notwithstanding that his only knowledge of its advocacy or activity subsequent to his expulsion in 1950 was derived from reading its publications. Thus he did not believe himself qualified to state whether or not the *History of the Communist Party of the United States* by William Z. Foster, its chairman, contained an authoritative statement of the position of the organization in 1952, when the book was written, on the form which the transition to socialism would take in the Untied States (R. 172, 288-89, D. Ex. 3).

[10] In this respect, Lautner's testimony differed sharply from that given by him in other Smith Act cases, including those now before the Court. *Yates* v. *United States*, No. 308 (cert. granted Oct. 17, 1955); *Mesarosh* v. *United States*, No. 566 (cert. granted Dec. 12, 1955), and *Scales* v. *United States*, *supra*.

[11] As the trial court instructed the jury (R. 583) the words "revolution" and "destruction" do not imply the use of force or violence. "Revolution" is defined as "a radical change in social or government conditions". Webster's *New International Dictionary*. And the Smith Act itself speaks of the "destruction of any such government *by force or violence*".

Lenin and Stalin,[12] the *History of the Communist Party of the Soviet Union*, by Soviet authors dealing with the history of the Russian Communist Party and its predecessors from 1883 to 1937 (G. Ex. 22), and an article written by William Z. Foster in 1945 (G. Ex. 48). Some of these excerpts, including the Foster article, were in no way connected with the petitioner but were referred to by Lautner as "documenting" his opinion as to the meaning of Marxism-Leninism (R. 206-09) and were received for the limited purpose of their relevance, if any, to such opinion testimony (R. 227). Other excerpts were admitted on the basis of the testimony of Meyer that he had discussed them with the petitioner (R. 72, 80-81, 97-108, 228-31). As we have seen, however, there was no testimony by Meyer or any other witness as to the petitioner's interpretation of these excerpts or as to the use he made of them in his teaching.

(4) The Current Teaching and Advocacy of the Communist Party.

Apart from Lautner's opinion testimony, the only evidence in the record concerning the teaching and advocacy of the Communist Party on the transition from capitalism to socialism in the United States is contained in two exhibits.

The first, the current party constitution, introduced by the prosecution, states that the ultimate objective of the organization is "the establishment of socialism by the free choice of a majority of the American people." It further provides for the expulsion of any member "who advocates force and violence or terrorism" (R. 479).

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[12] The books from which these excerpts were taken and their original publication dates are: Marx and Engels, *The Communist Manifesto*, 1848 (G. Ex. 18); Lenin, *What Is To Be Done*, 1902 (G. Ex. 41); Lenin, *State and Revolution*, 1917 (G. Ex. 23); Lenin, *Left Wing Communism*, 1920 (G. Ex. 25); Stalin, *Foundations of Leninism*, 1924 (G. Ex. 19); Stalin, *Problems of Leninism*, 1926 (G. Ex. 21).

The second exhibit is the *History of the Communist Party of the United States*, by William Z. Foster, published in 1952, and identified by a prosecution witness as containing an authoritative statement of the position of the Communist Party on various questions of the day (R. 426-27). The book contains a detailed outline of the party's teaching and advocacy concerning what the author calls "the American road to socialism," involving the transition from capitalism to socialism by peaceful, democratic processes (R. 476-79).

The prosecution offered no evidence to contradict the unequivocal statements contained in the constitution and the Foster book. Nor did it offer evidence that these statements were not intended to mean or were not understood by the petitioner to mean exactly what they say. On the contrary, as we have seen, the testimony of the prosecution's own expert fully corroborated this documentary evidence.

The Conviction and Sentence.

The trial judge reserved decision on petitioner's motion for judgment of acquittal until after the verdict. He stated however that he felt himself bound by the decisions in Smith Act conspiracy cases which, as he put it, "modified the rules of evidence that I have known anything about for the last number of years" and changed the law as he had practiced it during his many years on the bench (R. 472-73, 480-81).

Accordingly, after the return of the verdict, he denied petitioner's motion and imposed sentence of five years' imprisonment and a fine of $5,000 (R. 610-11).

The Opinion Below.

The opinion below holds that the evidence was sufficient to sustain the verdict. It premises this conclusion on a finding that the Communist Party currently advocated the violent overthrow of the government as speedily as circum-

stances would permit. The only evidence it cites in support of this finding consists of excerpts from the "classical" writings of Marx, Engels, Lenin and Stalin which it believes contain such advocacy (App. A, *infra*, p. 46). Thus, the opinion imputes to the Communist Party advocacy of the court's interpretation of political theories advanced by foreign Communists a quarter of a century to a century ago. It ignores the testimony of the prosecution's "expert" and the only writings on the subject by American Communists which are in evidence, all of which establish that the Communist Party currently advocated the achievement of its socialist objective by peaceful and democratic means.[13]

The opinion then finds that petitioner had knowledge that the Communist Party taught and advocated proscribed doctrine. The only evidence on which it relies for this conclusion is that petitioner was an active member and officer of the organization, was familiar with the "classical" literature, urged its study, and taught in Communist Party schools. From these bare facts, the opinion imputes to petitioner knowledge of the teaching and advocacy which it imputes to the Communist Party.[14] From the same facts, and from the statement attributed to petitioner by Brzek, the opinion also imputes to petitioner a specific intent to bring about the violent overthrow of the government as speedily as circumstances would permit. (App. A, *infra*, p. 44.)

We later discuss those portions of the opinion which sustain the constitutionality of the statute, reject petitioner's contentions with reference to section 4(f) of the In-

[13] The opinion also disregards the warnings of the "classical" authors on whom it relies that Marxism is not a dogma and that its application is always dependent upon historical conditions prevailing at the time and place in question (see e.g., R. 474-75).

[14] The opinion disregards the only evidence as to the defendant's understanding of the application of Marxism-Leninism, i.e., that "It does not, nor can it, determine for us beforehand, the form nor the exact time of a new social development" (R. 475).

ternal Security Act and the Communist Control Act, and affirm the evidentiary rulings of the trial court which petitioner urged required a reversal.

Reasons for Granting the Writ

I. The decision below that the evidence sustains the verdict is in conflict with applicable decisions of this Court and violates accepted and constitutionally protected standards governing proof of guilt.

This case presents, in the sharpest and most exaggerated form, the question whether Communist defendants in Smith Act cases are to enjoy the benefit of accepted and constitutionally protected standards of proof.[15]

Under the terms of the membership clause and by virtue of constitutional considerations,[16] the conviction of the petitioner, an acknowledged member of the Communist Party, required proof: (1) That, to his knowledge, the Communist Party was a society of persons who advocated the proscribed doctrine; (2) that, to his knowledge, such advocacy was couched in language of incitement and was engaged in with the intention of causing the violent overthrow of the government "as speedily as circumstances would permit;"[17] and (3 that petitioner himself had the specific intent of bringing about such violent overthrow "as speedily as circumstances would permit."[18]

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[15] The Court has recently agreed to consider questions concerning the nature of the evidence required to sustain convictions in Smith Act conspiracy cases. *Yates* v. *United States* and *Mesarosh* v. *United States*, both *supra*. The petition for certiorari in *Scales* v. *United States* raises similar questions under the membership clause. The court below cited the *Mesarosh* and *Scales* cases in support of its decision that the evidence sustains the verdict.

[16] See *Dennis* v. *United States*, 341 U. S. 494.

[17] The trial judge so instructed the jury (R. 576, 581-82).

[18] We later urge (*infra*, p. 17) that the membership clause is unconstitutional on its face because it does not make intent an element of the offense.

Accepting the testimony of the prosecution witnesses in its entirety, there is no evidence which could conceivably support any of these propositions, let alone all of them.

The evidence presented by the prosecution spanned 19 years of the petitioner's life and membership in the Communist Party and dealt with his public speeches, writings, classroom teaching and private conversations during that period. Yet the prosecution produced no evidence that petitioner had ever said or written a word in which he advocated the violent overthrow of the government or expressed an opinion that the Communist Party advocated such overthrow. Nor was there any evidence that any officer or member of the Communist Party ever said or wrote that he or the organization advocated violence.

Nevertheless, the court below held that the evidence was sufficient to establish guilt. Its conclusion as we have seen (*supra*, pp. 11-12), was arrived at by piling unwarranted inference on inference. The court's theory that guilty knowledge could be established by imputing its interpretation of the "classical" literature first to the Communist Party and then to the petitioner was palpably erroneous.

Dennis held (at 501-02) that the peaceful study, discussion and teaching of the writings of Marx, Engels, Lenin and Stalin is not and cannot be proscribed. Yet, there is not a scintilla of evidence in the record that petitioner or the Communist Party did more. *Schneiderman* v. *United States*, 320 U. S. 118, 154-55, characterized the excerpts from the "classics" on which the court below relied as "over-exaggerated polemics bearing the imprint of the period and place in which written," and held that the views which they expressed could not be imputed to a member of the Communist Party merely by virtue of active membership and familiarity with the texts. *Schneiderman* further held (at 157-59) that these excerpts are susceptible of an innocent interpretation and that where two interpretations of an organization's program are possible, the courts are

not justified in "imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation." The opinion below cites no such overt acts, and there were none.

Moreover, it is a far cry from the finding of the court below that the "classics" advocate violent revolution to the conclusion that the political polemics of German and Russian Communists, written from thirty to one hundred years ago, are current incitements to the violent overthrow of the United States government "as speedily as circumstances will permit." In fact, the opinion below makes no attempt to bridge this gap. It simply ignores the existence of the requirement which, as the jury was instructed, limits the advocacy proscribed by the Smith Act to incitements to action as soon as action is feasible.

Thus the inference of guilty knowledge indulged in by the court below would have been invalid even in the absence of countervailing evidence. In fact, the record affirmatively establishes petitioner's innocence. The Lautner testimony and the statements in the party constitution and the Foster book (*supra*, pp. 9-11), none of which was contradicted, prove for the purposes of this case that the Communist Party advocated a peaceful path to socialism. Furthermore, the Lautner testimony (R. 277-78) and the only evidence in the record as to petitioner's understanding of Marxism-Leninism (*supra*, p. 8) show that both he and the Communist Party agree with the strictures of the Court in *Schneiderman* against a dogmatic reading of the "classical" literature of Communism or their mechanical application to situations outside of the historical context in which they were written.

Accordingly, the evidence not only fails to support but refutes the charge of guilty knowledge. The case for conviction is, if possible, even weaker on the issue of petitioner's intent. Membership in an organization with knowl-

edge of its purpose does not establish the member's intent to effectuate the purpose. The member's alleged state of mind must be proved independently. *Schneiderman* v. *United States, supra* at 136; *Knauer* v. *United States*, 328 U. S. 654, 669; *Baumgartner* v. *United States*, 322 U. S. 665; *United States* v. *Hauck*, 155 F. 2d 141, 144.

Such proof is completely lacking here.[19] The court below quotes the statement in *American Communications Association* v. *Douds*, 339 U. S. 382, 411, that "the state of a man's mind must be inferred from the things he says and does." But it can cite nothing that defendant said or did beyond his active membership in the Communist Party and the statement attributed to him by Brzek (*supra*, p. 7) which —if made—was entirely consistent with innocence (App. A. *infra*, p. 44).

Whatever the personal views of jurors and judges as to the advocacy of the Communist Party and the intent of its members, and whatever the findings of courts in other Smith Act cases, the petitioner was entitled to be adjudged solely on the record in *this* case. On that record, the conviction cannot stand. The court below sustained it only by disregarding the presumption of innocence, the principle that guilt is personal, the constitutional protection accorded expression and association,[20] and the provision of section 4(f) of the Internal Security Act that the holding of office or membership in a Communist organization shall not per se constitute a violation of any criminal statute.

In these aspects, the decision below presents questions of fundamental importance to the administration of justice which require review.

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[19] Cf. *Hartzell* v. *United States*, 322 U. S. 680, in which the Court reversed a conviction for lack of proof of the requisite specific intent where the evidence went far beyond anything that appears in this record.

[20] We later show (*infra*, pp. 21-23) that in addition to all of its other infirmities, the evidence wholly fails to satisfy the clear and present danger test.

II. The decision below that the membership clause is constitutional on its face and as applied is in conflict with the applicable decisions of this Court and presents constitutional questions which have not been but should be settled by this Court.

The advocacy and organizing provisions of the Smith Act, sustained in *Dennis* v. *United States*, 341 U. S. 494, punish individuals for their own advocacy or conduct. The membership clause, on the other hand, does not penalize the accused for his own advocacy but for the advocacy of others in the group of which he is a member. It is not advocacy but association which the clause makes criminal. The crime involves no overt act beyond the act of becoming or remaining a member of the group. An accused may be convicted notwithstanding that his membership is completely passive.

The court below, failing to consider the differences between the provisions of the Smith Act involved here and in *Dennis*, holds that *Dennis* is decisive of the validity of the membership clause (App. A, *infra*, p. 49). This is plainly not the case. On the contrary, under the rationale of the *Dennis* decision, the membership clause is unconstitutional on its face and as applied in this proceeding.

A. The failure of the membership clause to include intent as an element of the offense.

The membership clause does not require proof of the accused member's intent. Accordingly, a member may be convicted despite the fact that he is not an adherent of the proscribed doctrine. His knowledge of its advocacy by other members is alone sufficient to condemn him. In this respect, the statute violates the First Amendment and due process. *Dennis* v. *United States*, supra, at 515-16. And cf. *Adler* v. *Board of Education*, 342 U. S. 485, 494-96, where the Court sustained the New York Feinberg Law

only because that statute does not make membership in an organization which advocates violent overthrow, accompanied by knowledge of such purpose, conclusive evidence of ineligibility to teach in the public schools, but affords the accused teacher a hearing in which he may rebut the inference that he supports the proscribed purpose.

The indictment (R. 3) seeks to remedy the fatal defect in the membership clause by charging that the petitioner intended to bring about violent overthrow as soon as circumstances would permit. This attempt to import a specific intent into the statute is based on a fallacious application of *Dennis*.

Dennis held (at 499) that an intent to overthrow the government by violence was a necessary (although unexpressed) element of the crimes defined in the advocacy and organizing provisions of the Smith Act because,

> "Congress was concerned with those who advocate and organize for the overthrow of the government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about overthrow."

However, the nexus between overt act and criminal intent which was the foundation for the conclusion in *Dennis* does not exist in the case of the membership clause.

For example, it is well known, and the evidence here abundantly establishes (e.g., R. 402-07), that the Communist Party advocates many objectives which are concededly legitimate and shared by non-Communists. Individuals may be attracted to and may join the organization because they believe in and desire to support these innocent objectives and without any intention of overthrowing the government. It is because of this obvious fact that the Court has held that an intent to effectuate an alleged evil purpose of an organization (including the Communist Party) cannot be imputed to a member merely by virtue of his membership with knowledge of such purpose. *Schneiderman* v.

United States, *Knauer* v. *United States*, *Baumgartner* v. *United States*, *Adler* v. *Board of Education*, all *supra*.

The Smith Act itself recognizes the distinction between overt acts which can be said to carry their own specific intent and those which plainly cannot. For it makes the publication or distribution of literature containing proscribed advocacy a crime only when accompanied by a specific intent to overthrow the government. It seems clear, therefore, that the omission of a similar intent requirement from the membership clause was deliberate.[21]

B. The imputation of guilt solely by reason of association.

Even if the membership clause could be said to import criminal intent as an element of the offense, it would nonetheless be invalid because it imputes guilt from association which is not accompanied by any overt act of wrong-doing.

Two decisions of the Court are decisive of the unconstitutionality of legislation penalizing membership in the Communist Party (which was assumed, for the purpose of the decisions, to advocate violent overthrow) when unaccompanied by any illegal act or illicit advocacy. *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242. In both cases, much more was shown as to the activities of the defendants on behalf of the Communist Party than the passive membership which is sufficient under the membership clause. *De Jonge* was decided without reference to the defendant's knowledge of the advocacy of seditious doctrine by the organization or to his intent. It held (at 364-66) that the conclusive fact for constitutional purposes was that the defendant had not engaged in incitement to violence or crime. In *Herndon* (at 260-61), the defendant was assumed to have had knowledge of the organization's alleged seditious advocacy, but the Court reversed in the absence of proof of personal advocacy or acts of violence on his part.

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[21] The court below, like the court in *Scales*, sustained the statute without discussing the effect of omitting the element of intent.

The decision in *American Communications Association* v. *Douds*, 339 U. S. 382 clearly foreshadows the unconstitutionality of the statute involved here. For the membership clause contains all the vices which the Court held (at 402-04) would invalidate legislation penalizing membership in the Communist Party. (See also, Mr. Justice Jackson's partial concurrence, *id.*, 434.)

The opinion below makes no reference to the foregoing decisions. It states (App. A, *infra*, p. 48):

> "Had the defendant confined his advocacy and teaching for a change in our form of government within the limits of constitutional processes, he would clearly have been protected by the First Amendment."

Thus the court decided the case as though it had arisen under the advocacy provisions of the Smith Act, ignoring the fact that the offense defined in the membership clause and charged in the indictment does not involve advocacy by the accused but rests solely on association.[22]

The court below also expressed agreement with the opinion in the *Scales* case, *supra*, sustaining the constitutionality of the membership clause (App. A, *infra*, p. 51). The *Scales* opinion (Appendix A to petition for cert., p. 33) treats the membership clause as a statute that punishes conspiracies to overthrow the government. By eliminating advocacy from the statute, the court in *Scales* dispensed with the embarrassing necessity of considering the effect of the First Amendment. And by importing conspiracy into the statute, the court was able, at all events, to equate it with the conspiracy considered in *Dennis*. Plainly, there is no warrant in the membership clause for either of these steps. Even if there were, a reversal would be necessary. For if the opinion in *Scales* is right, the petitioner was convicted of a crime with which he was not charged, for which

[22] Moreover, as we have shown (*supra*, p. 14) there was no evidence that petitioner had ever advocated violence, and the court cited none.

he was not tried, and which was not proved. *Cole* v. *Arkansas*, 333 U. S. 196.

C. The absence of a clear and present danger.

On its face and as applied, the membership clause fails to satisfy the clear and present danger test as it was formulated in the *Dennis* decision.

Dennis emphasized the nature of the overt acts of advocating and organizing for overthrow with which the defendants were charged and what it characterized (at 511) as the "highly organized conspiracy" of which they were the leaders. It stated (*id.*) that, "It is the existence of the conspiracy which creates the danger." The membership clause, however, contains none of these elements. Since it does not involve a conspiracy, the factor which the Court held created the danger is utterly lacking. The accused need not be a leader, but may be a rank and file member of the organization. He need not have engaged in any overt act other than the act of becoming or remaining a member. Indeed, since organizing and advocacy are prohibited by other provisions of the Smith Act, the thrust of the membership clause is against passive members or those whose activity is confined to legitimate advocacy.

The membership of a single individual whose activity is so confined cannot possibly be said to create a clear and present danger to the government of the United States. Nor does the addition of such subjective factors as knowledge and intent (if the latter can be imported into the statute) in any way increase the "danger" in the absence of conduct beyond the bare act of association.[23]

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[23] Since the membership clause is directed against individual membership, the question whether the organization presents a clear and present danger does not arise. That question would be relevant, if at all, only to legislation imposing sanctions on the organization or those who engage in organizing it.

The Court in *Dennis* (at 516) stated that its decision turned on "the intent of the defendants, the nature of their activities" and "their power to bring about the evil." The membership clause authorizes the conviction of an accused who has engaged in no activities and who is powerless to bring about the evil. As we have shown, it does not even require proof of intent. Accordingly, under the standards laid down in *Dennis*, the clause is unconstitutional on its face.

Even if the membership clause could be said to be intrinsically valid, its application to petitioner was unconstitutional. The issue under the clear and present danger test, as applied by *Dennis* to a Smith Act indictment, is whether the conduct of the defendant, in the light of the domestic and international situation existing at the time of the indictment, gave rise to a clear and present danger of the violent overthrow of the government.[24]

The evidence concerning petitioner's activities during the three years preceding the indictment showed only that he had been a member and officer of the Communist Party, had spoken at three meetings (R. 307-10, 334-35, 370-72) and had written three articles (G. Exs. 59, 64, 66; R. 345, 379-80). As we have seen (*supra*, p. 8), these speeches and articles contained nothing but legitimate political advocacy. Under no circumstances could they be even remotely "dangerous."[25]

Moreover, the international setting in May 1954 when the indictment was returned was very different from that in the period of the Berlin air lift and the wars in Korea and Indo-China. At and since the date of the indictment, there

[24] It was the "highly organized conspiracy" of the *Dennis* defendants coupled with the "inflammable nature of world conditions" and "the touch-and-go nature of our relations with other countries" in the summer of 1948 that the Court found (at 511) created the danger.

[25] As the record establishes, petitioner's activities prior to the three-year period were equally devoid of "danger".

has been "no active battlefield anywhere in the world," [26] international tensions have relaxed, and, as our government leaders have reiterated, the danger of war has materially diminished.[27]

Accordingly, neither of the factors which were held to supply the constitutional foundation for the decision in *Dennis* is present on this record.

The court below, disregarding the distinctions between this case and *Dennis*, relied on the latter as authority for the conclusion that the membership clause, on its face and as applied here, satisfies the clear and present danger test (App. A, *infra*, p. 50). The court also relied on the opinion in *Scales* which, as we have seen, holds that the membership clause does not involve conduct protected by the First Amendment and hence that the clear and present danger test is inapplicable (Appendix A to petition for cert., p. 36).

The fundamental constitutional questions decided below demand review. We believe that *Dennis* was wrongly decided and share the hope expressed by Mr. Justice Black (at 581) that "in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." But whatever its ultimate fate may be, the *Dennis* decision provides no warrant for the constitutionality of the membership clause or for the affirmance of a conviction thereunder on a record devoid of evidence of illicit advocacy, incitement to violence or evil knowledge or intent, and in context of a world situation which offers the hope of durable peace.

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[26] President Eisenhower, *N. Y. Times*, Oct. 21, 1954.

[27] On the effect of this change in conditions since the *Dennis* decision. Cf. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543.

III. The affirmance below of the trial court's denial of petitioner's motion that the court inspect the contemporaneous report made to the F. B. I. by a prosecution witness concerning the subject matter of his testimony is in conflict with decisions in other circuits and presents a question which should be settled by this Court.

As we have been (*supra*, p. 8), the informer, Brzek, admitted making a contemporaneous report to the F. B. I. concerning a 1947 classroom lecture by petitioner about which the witness testified. The trial court denied petitioner's motion that the prosecution produce the report for inspection by the judge so that he might determine whether it contradicted the testimony and should be made available to the defense (R. 467-69, 472). This action was erroneous and required a reversal.[28]

If Brzek's F.B.I. report in fact contradicted his testimony, petitioner was entitled to have it for use in cross-examination and introduction in evidence. *Gordon* v. *United States*, 344 U. S. 414, 417. Obviously, the report iself contained the best if not the only available evidence as to the existence of a contradiction. Accordingly, as the courts in other circuits have held under identical circumstances, petitioner was entitled to have the trial judge inspect the report and determine whether it discredited the testimony and was therefore material to the defense. *United States* v. *Le Bron* (C. A. 2), 222 F. 2d 531, 537; *United States* v. *Krulewitch* (C. A. 2), 145 F. 2d 76, 78; *United States* v. *De Normand* (C. A. 2), 149 F. 2d 622, 625; *United States* v. *Simonds* (C. A. 2), 148 F. 2d 177, 179; *Boehm* v. *United States* (C. A. 8), 123 F. 2d 791, 807-08; *Crosby* v. *Pacific S. S. Lines* (C. A. 9), 133 F. 2d 470, 475; *United States* v.

[28] The witness's attribution to petitioner of repeated references to bloodshed (R. 460-62) was plainly prejudicial, and his testimony was relied on by the court below.

Schneiderman (D. C. S. D. Calif.), 106 F. Supp. 731.[29] The procedure approved in these cases was followed in the *Scales* case, as appears from the opinion (Appendix A to petition for cert., p. 44). It has also been followed in the Fifth Circuit. See *Shelton* v. *United States*, 205 F. 2d 806, 814.[30]

The court below treated the motion as though petitioner had asked for the immediate submission of the Brezek report to him, and not for its inspection by the trial judge. Erroneously stating that petitioner relied principally on the decision in *Gordon* v. *United States*, *supra*, the court affirmed the ruling of the trial judge on the ground that petitioner had failed to establish a contradiction between the testimony and the report (App. A, *infra*, p. 47). It did so without mentioning the decisions on trial court inspection of reports, referred to above, which petitioner cited and relied upon in his briefs below.[31]

The decision below requires review because it not only conflicts with the practice in other circuits but presents an important question concerning the minimum safeguard required to protect defendants in criminal cases against perjurious testimony of professional informers.

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[29] The latter case is now before this Court for review of other questions *sub: nom. Yates* v. *United States*, *supra*. The decision in the *Schneiderman* case was cited with approval by the trial court in the *Mesarosh* case, *supra*. See *United States* v. *Mesarosh*, 116 F. Supp. 345, 350.

[30] Where the trial judge determines after inspection that the report does not contradict the testimony, the defendant may have the report sealed and cerified as a part of the record on appeal. See the *Le Bron*, *Krulewitch*, *De Normand* and *Simonds* cases, *supra*.

[31] The opinion below is also in error in suggesting that petitioner's motion was not made until after the prosecution had closed its case (App. A, *infra*, p. 47). The motion was made at the conclusion of the witness's testimony and before the prosecution rested (R. 468, 472).

IV. The decision below sustaining evidentiary rulings of the trial court is in conflict with the decisions in other circuits and a departure from accepted principles applicable to criminal trials.

A. The Lautner testimony.

Lautner was permitted to state his "expert" opinion as to the meaning of Marxism-Leninism and as to the aims of the Communist Party (R. 203-11). There was no evidence that these opinions were known to or shared by the petitioner, the Communist Party or any of its members.

The admission of this testimony was plainly erroneous. The issues of fact for the jury were whether petitioner had the knowledge and intent charged in the indictment. Lautner's personal opinion about Marxism-Leninism and the Communist Party did not have the faintest relevance to either issue. Moreover, it was incompetent. It is elementary that the acts and declarations of third parties, neither authorized nor ratified by the accused, are inadmissible hearsay. *A fortiori,* opinion testimony must be excluded which, at most, represents the conclusion of the witness from the acts and declarations of unidentified third parties unconnected with the accused.

The court below dismissed our contention with the statement that the Lautner testimony was material (App. A, *infra,* p. 45).

Courts of appeals have held opinion testimony similar to Lautner's admissible in Smith Act conspiracy cases. E.g., *United States* v. *Dennis*, 183 F. 2d 201, 229. We believe this ruling erroneous. In any event, it was based on conspiracy law and is therefore inapplicable. As the *Dennis* decision makes clear (*ibid*), the theory of the courts in these cases was that since a statement by one of the conspirators as to his understanding of Marxism-Leninism would be admissible against his co-conspirators, the conclu-

sion of a witness drawn from such statements is likewise admissible. Since the indictment here does not charge a conspiracy, conspiracy law has no application. *McWhorter* v. *United States*, 281 F. 119, 121; *Sorenson* v. *United States*, 168 F. 785, 792.[32]

Although, as we have seen (*supra*, p. 9), Lautner's testimony refuted the charge against petitioner, it was nevertheless prejudicial. For his statement that the "classical" writings of Communism "documented" his opinion provided the foundation for their admission in evidence (R. 206-08, 225-27). And these writings furnished the sole prop for the verdict as well as for the affirmance below.

B. The Meyer testimony.

As we have seen (*supra*, p. 6), Meyer testified that he had discussed certain of the writings of Marx, Engels, Lenin and Stalin with petitioner, but there was no testimony as to the content of the discussion or concerning petitioner's interpretation of the writings or his understanding of their application to the United States. The most recent of these discussions occurred in "early 1940" (R. 96) and therefore ante-dated the Smith Act which did not become law until June 28, 1940 (18 U. S. C. 2385; Revisor's note).

The Meyer testimony would have been inadmissible, even if relevant to petitioner's knowledge or intent. For it cannot be presumed that a state of mind, innocent at the time it was shown to exist, would continue unchanged after the enactment of a law making it an element of an offense.

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[32] The court in *Scales* sustained the admission of Lautner's testimony in that case concerning his opinions and unconnected third party acts and declarations on the ground that an indictment under the membership clause charges a conspiracy to which conspiracy rules of evidence apply (Appendix A to petition for cert., p. 42). This theory, even if sound, would require a reversal of petitioner's conviction. For the case was not tried as a conspiracy case, and petitioner was therefore denied an opportunity to avail himself of the benefit of conspiracy instructions.

Wolf v. *United States* (C. A. 8), 259 F. 388; *Haywood* v. *United States* (C. A. 8), 268 F. 795, 806-07; *Langer* v. *United States* (C. A. 8), 76 F. 2d 817, 827. *United States* v. *Dennis* (C. A. 2), supra, at 231-32, and *United States* v. *Mesarosh* (C. A. 3), 223 F. 2d 449, 454 (cert. granted, Dec. 12, 1955) are to the contrary.[33]

Moreover, the Meyer testimony related to a period fourteen or more years prior to the indictment. In the absence of any evidence as to the content of the discussions which occurred in this remote period, the bare fact that petitioner was familiar with certain Marxist books and used them as classroom texts had, at best, only the slightest relevance to his knowledge and intent during the indictment period. Under these circumstances, the decision in *Dennis*, even if correct, is inapplicable, as the court in that case recognized. See *Kammann* v. *United States* (C. A. 7), 259 F. 192 with which the opinion in *Dennis* expressed agreement (at 231-232).

The court below sustained the admission of Meyer's testimony on the authority of the *Dennis* and *Mesarosh* cases and without mention of its decision in *Kamman* (App. A, p. 46, *infra*).

The error in the admission of the Meyer testimony required a reversal. For his testimony served as the sole foundation for the introduction of highly prejudicial excerpts from the "classics" (R. 96-108, 228-31) which formed the heart of the prosecution's case.

C. The "classical" literature.

If, as we have urged, the Lautner and Meyer testimony was inadmissible, it follows of course that the excerpts which they identified should likewise have been excluded.

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[33] But cf. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705-6, indicating approval of the rule adhered to in the Eighth Circuit.

They should have been excluded for the additional reason that there was no evidence that the petitioner (or, for that matter, the Communist Party or any of its members) understood or taught that the "classical" literature advocated the violent overthrow of the government of the United States.

The court below held that the excerpts were admissible nevertheless, stating that they were probative of the current program and teachings of the Communist Party and the knowledge and intent of petitioner (App. A, *infra*, p. 46). By this logic, Jefferson's recommendation that the tree of liberty be refreshed by the blood of patriots and tyrants [34] would be "probative" of a charge that the Democratic Party, to the knowledge of its members, currently advocates violent overthrow.

The Court has undertaken to review related evidentiary questions which arose in the *Mesarosh* and *Yates* cases, *supra*. Related questions are likewise presented by the petition for certiorari in the *Scales* case. Since the issues presented here will recur in all future prosecutions under the membership clause, review of the rulings below is required.

V. The affirmance below of the trial court's instruction that the teaching and advocacy alleged in the indictment has reference to the teaching and advocacy of the Communist Party as an entity and not to that of the members individually presents a novel and important question of statutory construction which should be decided by this Court.

Both paragraphs of the indictment (R. 3-4), in conformity with the membership clause, refer to the Commu-

[34] In a letter to William Smith hailing Shays' Rebellion. The court below seems to believe that we cited this statement as a justification for the advocacy of violence (App. A, *infra*, p. 45).

nist Party as "a society, group and assembly of *persons who* teach and advocate" the proscribed doctrine. Strictly construed, as they must be, the statute and the indictment plainly do not refer to the advocacy of the organization as an entity but to that of the "persons who" are its members. Obviously, if only the leaders or a small fraction of the members engaged in the proscribed advocacy, without authorization or ratification by the other members, the organization could not be a "society of persons" who so advocate. It follows that the indictment required proof that, to petitioner's knowledge, a majority, or at least a substantial proportion, of the members advocated illicit doctrine either personally or vicariously.

Petitioner's request for an instruction to this effect was denied (R. 616-18). Instead, the trial court instructed the jury (R. 520-21, 577) that the teaching and advocacy alleged in the indictment refers to the teaching and advocacy of the organization and not to that of its members individually. The court below affirmed without discussion.

The ruling below was erroneous. Had Congress intended the test of guilt to be knowledge of the alleged advocacy of the organization as an entity, it could have said so in clear and unequivocal terms. Indeed, it has said so clearly and unequivocally in the Immigration and Nationality Act and the Labor Management Relations Act, both of which deal with the advocacy of violence by organizations as such; 8 U. S. C. 1182(a)(28)(F), 1251(a)(6)(F), 1424(a)(4); 29 U. S. C. 159(h).

Nor can it be argued that the distinction between the two formulations is without a difference. An unincorporated association is an entity distinct from its membership. Acts or advocacy of the former cannot be imputed to the latter in the absence of authorization or ratification. *United States* v. *White*, 322 U. S. 694, 703; *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U. S. 295; *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S.

344; *Schneiderman* v. *United States, supra*, at 136; *Knauer* v. *United States, supra*, at 669.

Had the trial court granted petitioner's requested instruction, there could not have been a conviction. For the prosecution tried the case on the theory of the instruction which was given and offered no evidence that, to the knowledge of the petitioner or otherwise, individual members of the Communist Party engaged in, authorized or ratified the proscribed advocacy.

The question of statutory construction presented by the decision below will arise in all prosecutions under the membership clause. Accordingly, it should be settled by the Court.

VI. The decision below that Section 4(f) of the Internal Security Act does not bar prosecution of the offense charged in the indictment presents an important question of Federal law which should be decided by this Court.

Section 4(f) of the Internal Security Act (50 U. S. C. 783(f)) provides that, "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or *of any other criminal statute.*" (Emphasis supplied.)

The gravamen of the indictment is that membership in a Communist organization (the Communist Party) with knowledge of the alleged illicit advocacy of its members constitutes a violation of the membership clause of the Smith Act. The court below, quoting from the opinion in *Scales*, held (App. A, *infra*, p. 52) that the crime charged in the indictment is not within the immunity conferred by section 4(f) because membership "per se" does not embrace membership in the Communist Party when accompanied by knowledge that it advocates proscribed doctrine.

This restrictive construction of section 4(f) makes the reference to "any other criminal statute" meaningless and disregards the legislative history of the section and of the Communist Control Act.

It is obvious that Congress must have believed that membership "per se" constituted a violation of some criminal statute other than the Internal Security Act. Otherwise the reference to "any other criminal statute" would have been pointless. But the only other criminal statute which might have been applicable to members of the Communist Party by virtue of their membership was the membership clause of the Smith Act which makes guilty knowledge an element of the offense. Hence, Congress must have intended membership "per se" to embrace membership with guilty knowledge, but to exclude membership when not accompanied by any other *overt act*.

The legislative history confirms this reading of 4(f). It reveals that the purpose of the section was to insure the enforceability of the registration requirements of the Internal Security Act by making the privilege against self-incrimination unavailable to officers and members of Communist organizations as a defense against prosecutions for failure to register. (See e.g., letter of John W. Davis, Esq., Sen. Rep. No. 1365, 81st Cong., 2d Sess., pp. 43-44.)[35] Section 4(f), as reported out by the Senate and House Committees, limited the grant of immunity to prosecutions under sections 4(a) and 4(c) and omitted the reference to "any other criminal statute" which appears in the final enactment. (Sen. Rep. No. 1365, 81st Cong., 2d Sess., p. 2; 96 C. R. 13752.) The latter clause was added as an amendment on the floor of the House only after warnings had been sounded in both the Senate and the House that the section in its original form was inadequate because it did not confer immunity from prosecutions under the membership

[35] We are not here concerned with the question whether the immunity conferred by 4(f) is broad enough to accomplish this purpose but only with the question of Congressional intent.

clause of the Smith Act. (Sen. Rep. No. 2369, Part 2, 81st Cong., 2d Sess., pp. 12-13; 96 C. R. 14479, 15198, 13739, 13761.)

The legislative history of the Communist Control Act confirms the fact that Congress intended section 4(f) to immunize Communists from prosecution under the membership clause of the Smith Act and believed that the section accomplished that result. The Communist Control Act had its origin in S. 3706. Senator Humphrey offered an amendment, prefaced by a finding that the purpose of the Communist Party is to overthrow the government by violence, which would have made it a crime to be a member of the Communist Party with knowledge of its purpose (100 C. R. 13557).[36] Accordingly, the crime defined in the Humphrey amendment was substantially identical with the crime charged in the indictment.

The Attorney General and the Congressional leadership opposed the Humphrey amendment. They urged that its adoption would make the registration provisions of the Internal Security Act unenforceable by partially repealing section 4(f) and permitting the successful assertion of the constitutional privilege as a defense against prosecutions for failure to register. (See e.g., 100 C. R. 14041, 13836, 13956.) Acting upon these representations, Congress eliminated all criminal penalties for membership in the Communist Party from the act which it finally adopted. (See sections 3 and 4 of the Communist Control Act.) Thus, the Congressional debate and its resolution were based on the belief that, by virtue of section 4(f), membership in the Communist Party with knowledge of its alleged illicit purpose is not a crime under existing law and should not be made a crime. If that belief is sound, and we have shown

[36] All references to 100 C. R. are to the daily pagination. That guilty knowledge was an element of the crime which the Humphrey amendment proposed to create is not only apparent from the face of the amendment but was emphasized by the Senator in explaining its provisions during the debate. 100 C. R. 13581.

that it is, section 4(f) barred the offense charged in the indictment.[37]

The question of the effect of section 4(f) upon the prosecution of Communists under the membership clause of the Smith Act is important and novel and plainly should be settled by the Court.[38]

VII. The decision below that the findings of the Communist Control Act did not deprive petitioner of the right to a fair and impartial trial presents an important constitutional question which should be decided by this Court.

Congress found in sections 2, 3 and 4 of the Communist Control Act that the Communist Party advocates the violent overthrow of the government and therefore declared it to be an outlaw organization, stripped of all rights, privileges and immunities. One element of the offense charged in the indictment as construed by the trial court (see *supra*, p. 30) is that the Communist Party advocates violent overthrow. Petitioner was entitled to a fair and impartial jury trial of this, as of every other, issue of fact. *Manley* v. *Georgia*, 279 U. S. 1; *Frank* v. *Mangum*, 237 U. S. 309;

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[37] The court below (App. A, *infra*, p. 53), relied on Section 17 of the Internal Security Act (50 U. S. C. 796) providing that the act "shall be construed as being in addition to and not in modification of existing criminal statutes". However, the legislative history of Section 4(f) and familiar principles of statutory construction establish that this general savings clause was not intended to and does not override the specific reference to "any other criminal statute". *United States* v. *Yuginovich*, 256 U. S. 450, 463; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 207; *United States* v. *Ginn*, 222 F. 2d 289, 290-91.

[38] It is premature, in this petition, to consider the effect of a possible decision in *Communist Party of the United States* v. *Subversive Activities Control Board*, No. 48, this term, that the registration provisions of the Internal Security Act are unconstitutional or that the Communist Party is not a Communist organization as defined in that act.

Mooney v. *Holohan*, 294 U. S. 103; *Moore* v. *Dempsey*, 261 U. S. 86.

The Congressional finding made such a trial impossible. It would be naive to suppose, in the face of the finding, that a jury would even consider the question *de novo*, much less render a contrary verdict.

The court below held (App. A, *infra*, p. 52) that any prejudgment on the part of the jurors could have been discovered on *voir dire* and cured by appropriate instructions. Neither course could have overcome the prejudicial effect of the legislation, but would simply have directed the attention of the jurors to it. Cf. *Delaney* v. *United States*, 199 F. 2d 107, 112.

Congress cannot have its cake and eat it. It cannot declare a named organization to be engaged in criminal conduct and simultaneously preserve the right to a fair trial of the very issue which it has predetermined by fiat.[39] The decision below that Congress can do so presents a constitutional question which should be settled by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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New York 7, N. Y.,
Attorney for Petitioner.

[39] In fact, Congress did not intend to have it both ways. For as we have shown (*supra*, p. 33), it believed when it passed the Communist Control Act that the prosecution of Communists under the membership section of the Smith Act was barred by Section 4(f) of the Internal Security Act.

APPENDIX A

Opinion Below

January 12, 1956

Before DUFFY, *Chief Judge*, and LINDLEY and SWAIM, *Circuit Judges.*

DUFFY, *Chief Judge.* Defendant was convicted after a jury trial on a one count indictment which charged violation of the "membership" clause of Section 2 of the Smith Act. 54 Stat. 671, 18 U. S. C. § 2385.[1] The indictment was returned on May 14, 1954 and charged: 1) That, continuously since July 26, 1945, the Communist Party of the United States has been a "society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit." and 2) That, continuously since July 26, 1945, the defendant has been a member of the Communist Party of the United States of America well knowing during all of said period that said Communist Party "was and is a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit."

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1 "* * *

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government (in the United States) by force or violence; or *becomes or is a member of*, or *affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof*—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, * * *."

(The so-called membership clause is the portion italicized.)

Defendant moved to dismiss the indictment on the following grounds: 1) Section 2 of the Smith Act and the indictment violate the First and Fifth Amendments; 2) The indictment is barred by Section 4(f) of the Internal Security Act of 1950;[2] and 3) Section 2 of the Smith Act, as supplemented by sections 2, 3 and 4 of the Communist Control Act of 1954,[3] deny the defendant due process by depriving him of the right to a fair and impartial trial. The trial court denied the motion to dismiss.

At the trial, defendant's counsel stipulated that defendant had been a member and an official of the Communist Party during the period covered by the indictment. However, defendant was not a mine-run member of the Communist Party, nor was he an innocent worker, unhappy with his lot, who joined up with the Party in the expectation that it would eventually better his economic position. The evidence disclosed that Lightfoot was an intelligent, dedicated, crusading Communist, who rose to a position of great influence in his Party, not only in the midwest, but also on the national level.

The proof was that Lightfoot had been a member of the Communist Party since at least 1934. He was early a Section Organizer for the Young Communist League as well as a member of the District Bureau of that League. In 1936 he was a delegate to the Sixth Congress of the Young Communist International which is affiliated with the World Communist Party. Later, he was a Section Organizer for the Communist Party and was a member of

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[2] Section 4(f) of the Internal Security Act of 1950, Title 50, § 781 *et seq.*, provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. * * *"

[3] Sections 2, 3, and 4 of the Communist Control Act of 1954, 68 Stat. 775-776, 50 U. S. C. 841, 842, 843, find as a fact that the object or purpose of the Communist Party of the United States is to overthrow the government of the United States by force and violence.

the District Committee of the Illinois-Indiana District of the Party.

Lightfoot spent considerable of his time in teaching the various doctrines, aims and program of the Communist Party. He taught in Workers Schools as well as a considerable number of inner-party classes. He taught in District Training Schools which were secret schools for hardening and training leadership in Communist activities. These schools were taught only by leading party functionaries. In 1938 and thereafter, he taught under the supervision of the Director of the Chicago Workers Schools and the Educational Director of the Illinois-Indiana District of the Communist Party. He taught such subjects as Marxism-Leninism; History of the Communist Party of the Soviet Union; and other courses relating to the theory and practices of Communism. To teach some of these courses he had to be theoretically skilled in and have detailed information about Communist doctrine.

Lightfoot was early recognized as one of the top Communist leaders of the Illinois-Indiana District, and he functioned for many years as a full-time employee and representative of the Party. He was a paid employee of the Party as early as 1937. He made many speeches upon behalf of the Communist Party, at times speaking in praise of the success of the Russian Revolution under the leadership of Lenin and Stalin. At a party meeting in the Ashland Auditorium in Chicago in 1947, Lightfoot spoke of his experiences before the Illinois Legislative Committee which was investigating subversive activities, and he promised protective secrecy for the party records. At this assembly, he advised the membership on the use of the underground.

At the 1948 State Convention of the Party, Lightfoot was appointed as a regional director of a new party set-up to bring about Communist infiltration in the fourteen basic or vital community industries. On November 10, 1950

Lightfoot delivered the principal address at a Communist meeting to celebrate the 33rd anniversary of the Russian Revolution. On various business and public records defendant listed himself as Executive Director of the Communist Party of Illinois, and the Secretary of the Illinois State Committee of the Communist Party. Up to the time of the indictment he handled Communist Party funds for the Illinois group. In 1950 he was elevated to the position of Member of the National Committee of the Communist Party of the United States, a position which he held up to the time of the indictment.

Defendant moved for a directed verdict and for a judgment of acquittal which motions were denied. Later, he made motions in arrest of judgment and for a new trial which were likewise denied. Defendant urges the verdict and judgment of guilty are not supported by the evidence. Defendant says there was no direct evidence that he had knowledge of any teaching or advocacy of proscribed doctrine by the Communist Party or that he intended to bring about the violent overthrow of the Government of the United States. Defendant insists the Government's case rested entirely upon a series of inferences.

The Government offered evidence both documentary and by expert witnesses which, if believed, proved that for a number of years prior to 1944, and from and after July 26, 1945, the Communist Party of the United States was a political organization dedicated to the principles of Marxism-Leninism, and its aim was the destruction of the existing social order (which it called "Imperialism") as well as the destruction of "Imperialistic Government" including the United States of America. The Party taught that to reach the goal of the "Proletarian Revolution and the Dictatorship of the Proletariat", actual class revolt would be necessary, and violence and bloodshed inevitably would result.

The proof disclosed that the program of the Communist Party in the United States called for the development of

a close, well-disciplined organization with a highly trained staff of professional revolutionaries. The ultimate goal and objective of the Party was unchangeable, but the day-to-day program of activities might change as conditions and circumstances would require. As an illustration, when the United States went to war with Fascist Germany, Hitler was regarded in many parts of the world as the great anti-communist symbol. The revolutionary purposes of the Communist Party in the United States were temporarily abandoned, and a Communist Political Association was organized to take its place. One of the ostensible objectives of the Association was to work for socialism through processes of peaceful change. However, as soon as Hitler was eliminated in 1945, the Political Association was abandoned, and the Communist Party in the United States was reconstituted along the lines of Marxism-Leninism, as an instrument of class war and the dictatorship of the proletariat. The Party went forward with the program which had been temporarily abandoned, and this program continued during the years covered by the indictment.

Upon evidence very similar to and in many respects identical with that received in the case at bar, the Court of Appeals of the Second Circuit, in *United States* v. *Dennis, et al.*, 183 F. 2d 201, summarized some of the proof as to the organization, aims and activities of the Communist Party in this country, which summary was quoted by the United States Supreme Court in the *Dennis* case on appeal, 341 U. S. 494, 498, as follows:

> "• • • But the Court of Appeals held that the record supports the following broad conclusions: • • • that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the

Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.".

We hold that substantial evidence supports the charge contained in the first paragraph of the indictment, and that the jury was fully justified in finding beyond a reasonable doubt that the Communist Party in the United States has, from and after July 26, 1945, been a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit. A number of courts have held that evidence substantially the same to that appearing in the record before us, warranted a similar finding.[4] It might be noted that in the majority opinion in *Schneiderman* v. *United States*, 320 U. S. 118, heavily relied upon and frequently cited by defendant, the Court said (p. 153), "We do not say that a reasonable man could not possibly have found, as the district court did, that the Communist Party in 1927 actively urged the overthrow of the Government by force and violence. But that is not the issue here. * * *."

We next consider whether there was substantial proof in the record that the defendant was a member of the Communist Party well knowing that it taught and advocated the doctrine of overthrowing and destroying the government of the United States by force and violence, and that said defendant intended to bring about such overthrow by force and violence as speedily as circumstances would permit.

The evidence showed that for many years prior to the indictment Lightfoot was completely familiar with the ob-

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[4] *Dennis* v. *United States*, 2 Cir., 183 F. 2d 201, affirmed 341 U. S. 494; *Frankfeld et al.* v. *United States*, 4 Cir., 198 F. 2d 679; *United States of America* v. *Mesarosh*, 3 Cir., 223 F. 2d 449; *Scales* v. *United States*, 4 Cir., ... F. 2d ..... (decided November 7, 1955).

jectives of the Communist Party in the United States, and with the literature of the Party which advocated such objectives. Defendant was intimately acquainted with the "classical" writings of Marx, Engels, Lenin and Stalin which advocated the violent overthrow of capitalistic governments as speedily as circumstances would permit. In fact, defendant contributed articles to Party publications which stressed the importance of such "classics" in the Communist program. Perhaps his knowledge is best shown by the fact that Lightfoot was a teacher in the District Training Schools which were the secret schools for training Communist leaders. The teachers in these schools were leading Party functionaries. At no time did Lightfoot disavow the teachings of Communist leaders or writers.

There was direct testimony from the former educational director of the Illinois-Indiana District of the Communist Party that under his direction and supervision Lightfoot taught, among other subjects, Marxism-Leninism, and the History of the Communist Party of the Soviet Union. From the exhibits offered by the Government it appears that Russia, where the existing social order was overthrown by a violent revolution, was held up as an example of what could be accomplished by the Communists in this country.

We hold that the evidence proved that defendant had knowledge that the Communist Party of the United States advocated the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

Defendant insists that there is nothing in the record to show that he personally had the specific intent to bring about the overthrow of the government of the United States by force and violence, and he quotes from *Schneiderman* v. *United States*, 320 U. S. 118, 136, that membership in an organization with knowledge of its purposes is not evidence of the member's intent to effectuate such purposes.

We think the evidence was sufficient to prove not only defendant's knowledge that the aim and program of the Communist Party of the United States was the overthrow of our Government by force and violence as speedily as circumstances would permit, but that defendant likewise had such intent. Defendant was well acquainted with the Party doctrine of "Democratic Centralism" which required all members of the Party to accept, without question, the teachings of the Communist leadership under penalty of severe disciplinary action or expulsion.

"* * * the state of a man's mind must be inferred from the things he says and does." *American Communications Assn. C.I.O., et al.* v. *Douds*, 339 U. S. 382, 411. The law assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. *Cramer* v. *United States*, 325 U. S. 1, 31. "Actions of the accused are set in time and place in many relationships. Environment illuminates the meaning of acts, as context does that of words. What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation." *Cramer* v. *United States*, 325 U. S. 1, 32-33.

Lightfoot's years of devotion to the Communist Party in the United States, and his zeal in obtaining recruits for those doctrines which the Party advocated, and his energy in carrying out the objectives and program of the Party, all were matters properly considered by the jury upon the question of intent. *United States of America* v. *Flynn, et al.*, 2 Cir., 216 F. 2d 354, 360. Furthermore, there was direct evidence that at Lake Ivanhoe School conducted by the Party, while instructing a class on the procedures for the revolution of the proletariat the defendant stated: "If we have to spill blood, we will."

Although defendant's counsel argues there is no proof of defendant's advocacy or of his belief in the program of the Communist Party to overthrow the Government of the United States by force and violence in what may be an effort of justification in case it was found the defendant did so advocate, he quotes the following statement from Thomas Jefferson: "The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants. It is its natural manure." [5]

We are satisfied the evidence was ample both to require that the case be submitted to the jury and to sustain the verdict rendered.

Three of defendant's claims of error are: the testimony of the witness Lautner should have been excluded as hearsay; that testimony of the witness Meyer should have been excluded as remote and irrelevant; the excerpts of the "classics" should have been excluded as prejudicial and irrelevant.

John Lautner joined the Communist Party in 1929, and except during his period of army service, was a Communist Party organizer, teacher and leader until January 17, 1950. He has testified in a number of prosecutions under the Smith Act as an expert witness as to the teachings and program of the Communist Party of the United States. It seems clear that he was qualified as an expert witness on the subject about which he testified. In any event, whether the witness was qualified as an expert was a matter confined to the discretion of the trial judge. *Cohen v. Travelers Ins. Co.*, 7 Cir., 134 F. 2d 378, 384. No abuse of discretion has been shown. Furthermore, the matters about which he testified were material to the issues of the case at bar. We hold there was no error in receiving Lautner's testimony.

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[5] Taken from a private letter to William Smith written in 1787 prior to the adoption of the Constitution of the United States which in Article V made provision for amendment, whereby our form of government could be changed in a peaceful manner.

Frank S. Meyer testified that from 1934 to 1942 he had been closely associated with the defendant in the Illinois Communist Party. He testified relative to a conversation with defendant in 1940 with reference to the latter's teaching the History of the Communist Party of the Soviet Union. Although this occurred some years before the period covered by the indictment, it was admissible to show defendant's knowledge and intent. *United States* v. *Dennis*, 183 F. 2d 201, 231-232; *United States* v. *Mesarosh*, 223 F. 2d 449, 454. As stated by Judge Learned Hand in the *Dennis* case (page 231) "How far back of the commission of the crime one may go is a matter of degree, and within the general control of the judge over the relevancy of evidence. In the case at bar, there is not the least reason to hold that his discretion was abused. * * *." We hold there was no error in receiving Meyer's testimony.

Defendant also contends that it was error to admit into evidence excerpts from the Marxism-Leninism "Classics." These so-called "Classics" stress the importance of Marxism-Leninism "as a guide to action" and treat openly the subject of force and violence in the Proletarian Revolution and the establishment of the Dictatorship of the Proletariat. We think these excerpts were admissible not only as probative of the teachings and program of the Communist Party material under paragraph 1 of the indictment, but many of them were directly connected with the defendant in his capacity as teacher in the Party Schools, and were properly admitted as bearing upon his knowledge and intent.

Defendant claims the trial court erred in refusing to order the production of a report made to the FBI by the witness Brzek who was a member of the Communist Party from 1943 to 1947. In the latter year Brzek attended classes taught by defendant Lightfoot at a Communist School conducted in Ivanhoe, Wisconsin. It was at one of these classes Brzek testified that defendant stated: "If we have to shed blood, we will." On cross-examination

Brzek testified he had made a report with reference to said classes to the Milwaukee office of the FBI. The report thus made was not in the courtroom, nor did the witness use a copy thereof to refresh his memory. The motion to produce was made after the Government had closed its case. Defendant offered no oral testimony. On his claim of error, defendant relies principally upon *Gordon et al.* v. *United States*, 344 U. S. 414.

In *Gordon* the Court said, pages 418-19: "By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried: * * *"

In the case at bar nothing was developed on cross-examination to the effect that the report to the FBI conflicted with the direct testimony of Brzek. Thus an essential element of the rule stated in *Gordon* was not here present. No proper foundation was laid for the production of the report, and the trial court was correct in denying the motion to produce. *The United States of America* v. *Echeles*, 7 Cir., 222 F. 2d 144, 152-153; *Starr* v. *Commissioner of Internal Revenue*, 7 Cir., 226 F. 2d 721, 724; *Jencks* v. *United States of America*, 5 Cir., 226 F. 2d 540, 553; *Jencks* v. *United States of America*, 5 Cir., 226 F. 2d 553, 560-561.

Furthermore, we think that the District Court, under the rule stated in *Goldman* v. *United States*, 316 U. S. 129, 132, properly denied the defendant's motions. The Court, in that case, used this language:

> "We think it is the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the

witness' notes but are also a part of the Government's files, a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case."

To the same effect: *Ira Ikuko Toguri D'Aquino* v. *United States*, 9 Cir., 192 F. 2d 338, 375; *Imperatore* v. *United States*, 2 Cir., 193 F. 2d 409, 410; *Neal* v. *United States*, 5 Cir., 203 F. 2d 111, 118; *United States* v. *Mesarosh, et al.*, D. C., W. D. Pa., 116 F. Supp. 345, 349, 350.

A more difficult question is presented by defendant's claim that the membership clause of the Smith Act is unconstitutional on its face and as applied by the trial court. Defendant insists this clause imputes guilt solely by reason of association.

There is no doubt that an individual, or indeed, a group of individuals, may advocate and teach the desirability of a change in our form of government no matter how unpopular, radical or revolutionary the proposal may be, provided such changes are to be accomplished by processes which the Constitution provides. Had the defendant confined his advocacy and teaching for a change in our form of government within the limits of constitutional processes, he would clearly have been protected by the First Amendment.

Defendant's counsel makes frequent reference to the opinion of the Court in *Schneiderman* v. *United States*, 320 U. S. 118, to demonstrate that guilt is personal, and that members of a party or organization need not necessarily agree with the pronouncements of their leaders. Overlooked or ignored in such argument is the proof in the case at bar showing the rigid discipline imposed on Communist Party members during the period covered by the indictment. The corner-stone Party doctrine of "Democratic Centralism" left no room in the Party for members who might not agree with the program of the overthrow of our Government by force and violence.

Party members were bound to accept without question the teachings of the Communist leadership. The defendant was one of the most zealous of those teachers.

The United States Supreme Court has consistently recognized the inherent value of free discourse. However, it is settled that the right to free speech is not an unlimited, unqualified right but, as the Court said in *Dennis*, p. 503: "• • • the societal value of speech must, on occasion, be subordinated to other values and considerations."

Defendant admits that in *Dennis* the Supreme Court sustained the provisions of the Smith Act making it a crime for any person to wilfully and knowingly advocate the overthrow of the Government of the United States by force and violence; to organize or help organize any group which does so; or to conspire to do so.[5] The Court specifically held that a clear and present danger existed. However, defendant argues that the *Dennis* case marks the outermost limit of the Court's sanction of an abridgement of rights within the area guarded by the First Amendment. Defendant points out that the membership clause of the Smith Act was not an issue in *Dennis*, and insists that in the period covered by the indictment, no clear or present danger existed.

It was in *Schenck* v. *United States*, 249 U. S. 47, 52, that Justice Holmes announced the doctrine that: "• • • The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to

[5] The Court did not limit its holding of constitutionality to the organizing clause of this subsection, but held, at page 516:

"We hold that §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act do not inherently or as construed or applied in this instant case violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness."

prevent." The latest word from the Supreme Court on the subject of clear and present danger appears in the *Dennis* case.

We have before us an example of the ever-recurring problem presented to courts of striking a balance between freedom for the individual and the security for our country and government. "Self-preservation is a high prerogative of any sovereignty." *Communist Party of the United States* v. *Subversive Act Control Board*, 223 F. 2d 531, 543. "There is no constitutional right to 'gang up' on the government." Justice Jackson in *Dennis* v. *United States*, 341 U. S. 494, 577. In *Dennis* the Court said, p. 501: "No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence." And again, at p. 509: "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."

In explaining the phrase "clear and present danger" the Court, in *Dennis*, said at p. 509: "Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolution

ists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt."

In *United States* v. *Flynn*, 2 Cir., 216 F. 2d 354, 367, the Court held that the danger found in the *Dennis* case had not abated by the summer of 1951, the date of the *Flynn* indictment. But defendant argues that at the date of the indictment of the case at bar no shooting war was in progress and, therefore, conditions had changed. Furthermore, at the time of the oral argument before this Court, defendant's counsel seemed to be deeply impressed by the Spirit of Geneva, and he professed to believe that the Geneva Conference had resulted in a complete relaxation of International tensions. The period covered by the indictment is, of course, the critical period for us to consider. However, in any case, whether a clear and present danger existed cannot depend on whether the faces of the Communist Leaders in Russia are suffused with smiles. We need only make passing mention of the fact that at the time of the writing of this opinion, the smiles have been replaced with scowls, and the sugary words of such leaders have been supplanted by words of vituperative condemnation.

Only one other Court of Appeal has passed upon the claim that the membership clause of the Smith Act is unconstitutional. In *Scales* v. *United States*, ... F. 2d ..... (decided November 7, 1955) the Fourth Circuit held the membership clause of the Smith Act to be constitutional. *See also Frankfeld et al.* v. *United States*, 4 Cir., 198 F. 2d 679, 683, 684. We agree with the decision in *Scales*, and hold the membership clause of the Smith Act to be constitutional.

Defendant urges he was deprived of a trial by a fair and impartial jury as a result of the enactment of the

Communist Control Act of 1954, wherein Congress declared that the Communist Party advocates the overthrow of the Government of the United States by force and violence. Defendant does not contend that any prejudice on the part of any of the jurors in this case appears from the record. Rather, he urges it must be implied that a jury presumed to know the law will not ignore the statutory findings.

In effect, it is defendant's position that all persons subject to prosecution under the Smith Act are immunized from prosecution indefinitely, or at least as long as the Communist Control Act remains a part of the laws of this nation. We do not agree. If any jury had any such prejudgment, the instructions of the Court cured their error. Furthermore, whether any such belief existed in the mind of any juror, might have been discovered on the *voir dire* examination.

Defendant further contends prosecution of the offense charged in the indictment is barred by section 4(f) of the Internal Security Act, 50 U. S. C. 783(f), which provides that:

> "Neither the holding of office nor membership in any Communist organization by any person shall consitute *per se* a violation of subsection (a) or subsection (c) of this section of any other criminal statute."

Defendant argues that the purpose and intent of the section was specifically to bar prosecution of Communists under the membership clause of the Smith Act.

A similar argument was overruled in the *Scales* case. We quote with approval the following from that opinion:

> "The purpose of this provision, as defendant correctly argues, was to insure the enforceability of the registration provisions of the act by making the privilege against self-incrimination unavailable as a defense to failure to register. The language of the sec-

tion relied on, however, provides merely that neither holding of office nor membership in a Communist organization shall constitute *per se* a violation of a criminal statute. It does not purport to exempt from criminal liability membership in an organization advocating the overthrow of the government by force and violence where such membership is acquired or held with knowledge of the criminal purpose in which the organization is engaged. In other words, mere membership in the party is not a crime. Membership with knowledge of the criminal purpose of the organization remains a crime.

* * * * *

"* * * Even though the Communist Party has such purpose, membership *per se* is not made a crime under the Smith Act; and it is only membership *per se*, which is exmpted from criminal prosecution under section 4(f) of the Internal Security Act. That no modification of the provisions of the Smith Act was intended by Congress in the passage of the Internal Security Act of 1950 is made abundantly clear by section 17 of the Internal Security Act, 64 Stat. 1003, 50 U. S. C. 795, which provides:

> 'The foregoing provisions of this title shall be in addition to and not in modification of existing criminal statutes.'

In view of this interpretation which Congress itself placed on the statute at the time of its passage, there is no occasion for further discussion as to its effect upon the Smith Act. The charge of the court heretofore quoted, made it clear that defendant could not be convicted because of mere membership in the party."

Defendant claims error was committed in other comparatively minor matters. Suffice to say, we have considered his arguments in respect thereto and find them to be without merit.

The judgment of conviction is

AFFIRMED.

APPENDIX B

Statutes Involved

1. The Smith Act, 18 U. S. C. 2385.

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof——

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. Section 4(f) of the Internal Security Act, 50 U. S. C. 783 (f).

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

3. Sections 2, 3 and 4 of the Communist Control Act, 50 U. S. C. 841-43.

FINDINGS OF FACT

Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members.

The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however*, That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.